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IN THE

Supreme Court of the United States

October Term, 1965

No. 722

MANUEL GOMEZ BARRIOS, JOSE GARCIA RODRIGUEZ, JOSE MANUEL VENTURA VENTURA, EVALDO ESCANDEL SOTO,

Appellants,

v.

STATE OF FLORIDA.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF IN OPPOSITION

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1. The regulation of foreign affairs is, in appellants' view, a subject of *exclusive* federal power. But if the power is concurrent with the states', the area has been occupied by federal legislation and hence state legislation is preempted under the Supremacy Clause. While the field was occupied before the passage of the Bartlett Act, 78 Stat. 194, 16 U. S. C. §§ 1081-85 (Jur. St. pp. 5-9), preemption is even clearer as a result of that statute.

2. The Solicitor General's position is that "the question whether the federal government has occupied this field, to the exclusion of the States, will require consideration of the 1964 Act." (Memo p. 4.) We agree. Under this Court's recent decisions, it will consider the significance and effect of the 1964 Act. In *Hamm* v. *Rock Hill*, 379 U. S. 306, the Court decided affirmatively the precise

question presented here, *i.e.*, does the federal Supremacy Clause abate state action where a federal statute is enacted between the date of conviction and completion of appellate review? The Court there held that "[f]uture state prosecutions under the Act being unconstitutional", 379 U. S. 315, both principles of statutory construction and the Supremacy Clause require that the convictions must abate. *Cf. Bell* v. *Maryland,* 378 U. S. 226.

Similarly, in *Linkletter* v. *Walker,* 381 U. S. 618, 627, the Court reviewed the "form of limited retroaction" which is present here and held that "[u]nder our cases it appears (1) that a change in law will be given effect while a case is on direct review. *Schooner Peggy* . . ."[1] (And see *Linkletter* v. *Walker, supra,* at 627, n. 11.)

3. Both the appellee (Motion p. 2) and the United States (Memo. pp. 4-5) suggest that the question is insubstantial because the possibility of future prosecutions under Fla. Stat. Ann. § 370.21 is remote in view of the passage of the Bartlett Act. The Attorney General cannot commit the State of Florida to a permanent course of action or inaction; in any event, the relation of the United States with other sovereigns is an issue of such

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[1] In *United States* v. *Schooner Peggy,* 5 U. S. (1 Cranch 103, 110) Chief Justice Marshall stated, "It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns . . . [the law] ought always to receive a construction conforming to its manifest import. . . . In such cases the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

great public importance, that it transcends the particular prosecution. The question here is no less substantial than the questions presented in almost identical posture in *Hamm* v. *Rock Hill,* 379 U. S. 306 and *Hines* v. *Davidowitz,* 312 U. S. 52.

4. The cause is not moot by reason of appellants' payment of fines whether the matter be treated as one of state or federal law.

a. The law of Florida is not that the payment of a fine renders an appeal moot.

Both the Solicitor General and the Attorney General incorrectly cite *City of Miami* v. *Keton,* 115 So. 2d 547 (Fla. 1959) and *Grant* v. *Dubbs,* (*sub. nom. Granat* v. *Dulbs*), 108 Fla. 116, 145 So. 879 (1933) for the proposition that fines cannot be recovered. In neither case did the defendants appeal their convictions;[2] each instead sought to regain the fine imposed by collateral attack.

The issue of the mootness of this case under Florida law has been resolved by the Supreme Court of Florida. In the oral argument herein counsel, at the request of the Court, addressed themselves to the mootness question. That Court then affirmed on the merits.

The determination of this appeal on the merits by the Court below, if not conclusive, is at least entitled to great weight on this point. In any event, upon reversal of a conviction due process requires return of the fines. *Giacco* v. *Pennsylvania,* Oct. Term 1965 No. 52, 34 L. Wk. 4099.

b. The decisions in *St. Pierre* v. *United States,* 319 U. S. 41, *Pollard* v. *United States,* 352 U. S. 354 and *Fiswick* v. *United States,* 329 U. S. 211, cited by the Solicitor General in suggesting that the case "may" be moot are inapposite (Memo, p. 5). All these dealt with con-

[2] In the *City of Miami* v. *Keton* case the rationale of the court was the failure of the defendants to appeal.

victions in which the defendant had served his term of incarceration. None of these cases involved the payment of fines. This Court has never decided that where, following a conviction a fine has been paid as a condition of release from custody and no serious collateral infirmity attends a refusal to review, that the cause is moot.[3]

5. Appellee's suggestion that appellants have no standing appears based on the assumption that since no preliminary application for a license was made, appellants cannot complain of either the validity of the statute or the sanction imposed pursuant to its terms. Appellee's reliance on the Court's decision in *Smith* v. *Cahoon,* 283 U. S. 553 is misplaced.

The Court held in *Smith* v. *Cahoon, supra,* at 562, that where a licensing statute is unconstitutional on its face, there is no necessity to apply for a license as a condition precedent to testing its validity. In accord, *Chicago* v. *Acheson, Topeka & Santa Fe Ry.,* 357 U. S. 77, 89; *Public Utilities Comm'n* v. *United States,* 355 U. S. 534, 539-40; *cf. Lovell* v. *Griffin,* 303 U. S. 444, 452; *Jones* v. *Opelika,* 316 U. S. 584, 602, adopted per curiam 319 U. S. 103, 104; *Winters* v. *United States,* 333 U. S. 507; *Staub* v. *City of Baxley,* 355 U. S. 313.

6. Both the respondent (Motion, p. 4) and the Solicitor General (Memo, p. 5, n. 5) argue that the action of appellants in fact did not interfere with the United States' conduct of its foreign relations. The contrary is true. (See Jurisdictional Statement, p. 10.) More particularly, the issue is not whether in fact there was an interference, but rather whether the statute in question, Fla. Stat. Ann. § 370.21 *in terms* interferes with the exclusive power of the federal government to conduct United States' relations

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[3] The federal courts are in conflict in appeals from federal convictions where fines have been paid. See *Virgin Islands* v. *Ferrer,* 275 F. 2d 497 (3d Cir. 1960); *Bergdoll* v. *United States,* 279 Fed. 404 (3d Cir. 1922), as compared with *Hartzell* v. *United States,* 107 F. 2d 359 (5th Cir. 1939).

with other governments.[4] A statute which conditions license issuance or sanction upon a "designat[ion] as a friendly ally or neutral by a formal suggestion transmitted to the governor of Florida by the Secretary of State of the United States", Fla. Stat. Ann. § 307.21(3) (Jur. St. App., p. 15) by statutory definition imposes a burden on the United States representing interference in the conduct of its external affairs.

Respectfully submitted,

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Dated, March 31, 1966.

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[4] Respondent's suggestion that § 370.21 was enacted as a conservation measure, and that "in the absence of regulation by the United States, a state can regulate within its territory the liberality of fishing in its waters" is inaccurate. The language of the state law attests to its purpose. The Submerged Lands Act of 1953, 43 U. S. C. §§ 1301, 1314(a) explicitly reserved to the United States exclusive power over territorial waters where questions of international affairs were at issue (Jur. St., p. 6).

Of respondent's contention that § 370.21 applied to citizens of the United States, one need only refer to the explicit Title and preamble of the Act. The Act not only discriminates against aliens but against a particular class of aliens with no rational nexus between the ostensible purposes of conservation and the classification of aliens on the basis of political ideology.

END